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No. 88-305

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

BRIEF FOR PETITIONER

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA *
Chief Deputy
Attorney General and
Attorney of Record

Post Office Box 11549
Columbia, S. C. 29211

803-734-3737

COUNSEL FOR PETITIONER

* Counsel of Record

PETITION FOR CERTIORARI FILED AUGUST 5, 1988
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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE EIGHTH AMENDMENT PRECLUDE A PROSECUTOR'S COMMENTS DURING A CAPITAL MURDER PENALTY PHASE ON PERSONAL CHARACTERISTICS OF THE VICTIM WHERE THE CHARACTERISTICS ARE BASED ON EVIDENCE ADMITTED IN THE GUILT PHASE TO SHOW THE CIRCUMSTANCES OF THE CRIME?

II. DOES BOOTH v. MARYLAND, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), PRECLUDE PROSECUTORIAL COMMENT DURING A PENALTY PHASE CLOSING ARGUMENT ON EVIDENCE INTRODUCED DURING THE GUILT PHASE OF THE TRIAL THAT REVEALS PERSONAL CHARACTERISTICS OF THE VICTIM?

III. WHETHER THIS COURT'S DECISION IN BOOTH v. MARYLAND, SUPRA, MISCONSTRUED THE REQUIREMENTS OF THE EIGHTH AMENDMENT AND WAS WRONGLY DECIDED?

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OPINION BELOW

The opinion of the South Carolina Supreme Court affirming in part, reversing in part, and remanding for a new sentencing proceeding was filed on June 6, 1988. The case is reported as State v. Demetrius Gathers, 295 S.C. 476, 369 S.E.2d 140 (1988), and is

reproduced in the Joint Appendix [J.A.] at pages 58-67. Judgment was entered and the remittitur sent to the Court of General Sessions of Charleston County, South Carolina, on June 20, 1988.

JURISDICTION

The Writ of Certiorari issued upon a Petition seeking review of an opinion of the Supreme Court of the State of South Carolina which was filed on June 6, 1988. The Petition for Writ of Certiorari was filed on August 5, 1988, and the Writ of Certiorari was issued October 11, 1988. Petitioner submits this Court has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. § 1257(3) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution which provides: "Excessive bail shall not be

required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case involves prosecutorial argument in a penalty phase of a capital murder trial that commented upon non-objected evidence which was introduced in the guilt phase of the trial. The prosecutor's comment and guilt phase evidence revealed the personal characteristics of the victim at the time of the crime. The comment was held by the Supreme Court of South Carolina to violate the mandates of this Court's decision in Booth v. Maryland,

482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), because it focused "extensively on the victim's character." (J.A. pp. 64-66).

I. State Court Proceedings:

Demetrius Gathers was indicted at the January 12, 1987, and March 2, 1987, terms of the Court of General Sessions for Charleston County, South Carolina, for murder and criminal sexual conduct first degree. The prosecutor served his statutory notice of intent to seek the death penalty on January 14, 1987. Gathers stood trial before a jury and the Honorable Richard E. Fields, Presiding Judge, from March 16 to March 21, 1987. He was convicted of the indicted crimes on March 20, 1987. On March 21, 1987, a penalty phase hearing was held before the same jury and judge, pursuant to South Carolina law. After hearing evidence in aggravation and

mitigation, the jury unanimously recommended that Mr. Gathers be sentenced to death by electrocution. In accordance with South Carolina law, the jury found beyond a reasonable doubt the statutory aggravating circumstance that the murder was committed while in the commission of criminal sexual conduct first degree. S.C. CODE ANN. Section 16-3-20(C)(a)(1)(a) (1987 Supp.). Judge Fields sentenced Gathers to death in accordance with the jury's decision. S.C. CODE ANN. Section 16-3-20 (1987 Supp.).

Mr. Gathers appealed his sentence and conviction to the South Carolina Supreme Court, pursuant to S.C. CODE Section 16-3-25 (1987 Supp.). After briefing and oral argument, the Supreme Court of South Carolina issued its Opinion on June 6, 1988, affirming the convictions, reversing the death

sentence and remanding for a new sentencing hearing. State v. Demetrius Gathers, 295 S.C. 476, 369 S.E.2d 140 (1988). In the opinion, the Supreme Court of South Carolina concluded that the solicitor's closing argument at the sentencing phase of the trial violated Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), by focusing extensively on the personal characteristics of the victim. (J.A. p. 64). Particularly, the Supreme Court stated:

The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence.

(J.A. p. 66).

The Petitioner petitioned for certiorari to this Court raising the three questions for review addressed herein. Certiorari was granted October 11, 1988.

II. Pertinent Facts from the Trial.

The victim, Richard Haynes, a thirty-two year old black male was a self-proclaimed preacher who referred to himself as "Reverend Minister." (J. A. p. 6, Tr. p. 564). Around 10:15 p.m., on Saturday, September 13, 1986, Mr. Haynes left his parents' house for a walk on a bicycle path in a city park in Charleston, South Carolina. (J.A. pp. 5, 7). He carried with him various religious items, including Bibles, rosaries, statues, and various religious tracts such as the "Game Guys Prayer." During the trial, his mother, Dorothy Louise Haynes, testified that he carried his religious items and talked to people

all the time about the Lord. (J.A. p. 5). She also testified that he had mental problems over the last two years, but there had not been any problems in terms of violence. (J.A. p. 4).

On that evening, Mr. Haynes went to a park bench. According to the testimony of Esdavan Hardrick, the Respondent, Demetrius Gathers, along with his confederates, came upon the victim who was changing his clothes and tried to engage him in some conversation. (J.A. pp. 17, 32). Sitting out on the bench were the Bible and some paper religious tracts. (J.A. pp. 26-27). Gathers started talking with Haynes who stated that he did not want to talk to him at the time. (J.A. p. 18). Gathers struck the victim initially with his fist and the victim fell into another confederate Zandell Hayes and the victim "went wild." (J.A.

pp. 18-19). Hayes hit the victim and then Gathers and the victim continued tussling up the path on the ground. (J.A. p. 20). Haynes was eventually pinned to the ground and kicked and hit by a third confederate Dyonzoria Brown. (J.A. p. 21). Brown picked up a bottle and struck Haynes in the head twice. (J.A. pp. 21-22). Then Gathers picked up the bottle and hit the victim about three times in the head with the bottle until it broke while the victim was saying, "Oh, Lord," twice. (J.A. p. 22). The victim then fell unconscious and Hardrick and Hayes left. (J.A. p. 22).

Hardrick testified that he and Gathers looked through Haynes' belongings, including his bags, looking for something to steal. (J.A. pp. 26-27). When Gathers was going through them, he started throwing things

everywhere, while the victim was still on the ground. (J.A. p. 27). As the Supreme Court of South Carolina held, during the altercation, they rummaged through his belongings and found two Bibles and various religious tracts. These articles were introduced into evidence at the guilt phase of the trial without objection.

Gathers was still hitting the victim while the others left. (J.A. p. 23). Testimony was that he was striking the unconscious victim with an umbrella at this time about his back and head. (J.A. p. 23). According to Hardrick, he saw the victim's pants down to about his thighs and Gathers then used the top end of the umbrella and stuck it up the victim's anus while Haynes was groaning. (J.A. pp. 24-26).

After Gathers had inserted the umbrella, they left the scene and went

to a nearby apartment complex. (J.A. p. 29). Gathers showed them a knife. (J.A. p. 29). Later they started to return to the bike path, but Hardrick and Brown did not go. Gathers and Zandell Hayes went back to the victim. Upon returning, Gathers said that he had stabbed the victim. (J.A. p. 30).

During the guilt phase of the trial, the victim's mother, Reverend Dorothy Haynes, testified that her son had in his possession on the night of the murder various items including two Bibles, a plastic statue, rosary beads, olive oil, and a card on which was written "The Game Guy's Prayer." (J.A. pp. 8-10). Defense counsel affirmatively noted that he had "no objection" to the evidence being introduced. (J.A. pp. 8-10). Reverend Haynes also testified in the guilt phase that her son had mental problems and had

been in and out of the mental hospital three times in about two years. (J.A. pp. 4-5). pp. 561-563).

Officer Hazel of the Charleston City Police testified that upon arriving at the scene, he found the Bibles, the angel and personal papers laying to the right next to the body. (Tr. pp. 787-788). These items were admitted without objection of defense counsel. (Tr. pp. 786-787). No question has ever been raised that the introduction of these items was probative as reflecting Haynes' possessions that the perpetrators reviewed for stealing during the guilt phase. See (J.A. pp. 27-28).

During the guilt phase, forensic evidence was presented that revealed fecal material on the tip of the umbrella that was introduced at trial. (Tr. p. 765). Also, hair fibers

consistent with the victim's were found on the umbrella. (Tr. pp. 754-755). The forensic pathologist, Dr. Sandra Conradi, testified that the lacerations on the face were consistent with being struck with the umbrella and the injury to the face consistent to being struck with a fist or bottle. (Tr. pp. 980, 983). The stab wound to the abdomen, a pre-mortem injury was also consistent with a knife blade. (Tr. p. 984). She further testified that the rectal injury was pre-mortem. (Tr. pp. 987-988). She gave her opinion that the cause of death was a homicide caused by a combination of factors. (Tr. p. 989). These factors were the bleeding from the head and scalp wounds, the vomitus in his airways, pain and suffering causing cardiac irregularities, and fat emboli in his lung. (Tr. pp. 989-990). On cross-examination, Dr. Conradi testified

that she could not state whether the stab wound to the stomach or the rectal injury occurred last in time, but that they each occurred after the head injury. (Tr. pp. 1013-1014).

The jury convicted Gathers of murder and criminal sexual conduct first degree. In the penalty phase, the state introduced all testimony from the guilt phase expressly without objection from the defense counsel. (Tr. p. 1167). Solicitor Condon also introduced into the record a stipulation of Gathers' prior criminal history. (Tr. p. 1167). In mitigation, Gathers presented testimony attempting to impeach the forensic pathologist's opinion as to when the anal injury occurred. (Tr. pp. 1169-1175). Also, Gathers' mother testified for mercy because he was a nice boy and was always helping people and doing things. (Tr. pp. 1182-1183).

The defendant's cousin testified about his family being a single parent family and his sisters' employment and educational status. She testified that his oldest sister Elvira was twenty - three years old living in Detroit and employed by the Highway Department and Gathers' brother, Mark Simmons, was thirteen years old. (Tr. p. 1186). Further, she testified that Ellena lived with her mother and was unemployed but attended a technical education school. Gathers' youngest sister was a fourteen year old high school freshman who also lived with her mother. (Tr. p. 1187). She also testified that the defendant was an affectionate child and close to her son. (Tr. p. 1187). She claimed that his criminal problems developed from "other people telling Demetrius what to do when his mother told him what not to do. (Tr. p. 1188).

Gathers' sixth grade school teacher, Mary Sistrunk, testified that Gathers was not one of her brighter students and she had "to force him to get what I want done." (Tr. p. 1191). She described him as an introvert, a follower, who wanted approval as a typical boy. She testified that he did not cause many problems. (Tr. p. 1193). His sister, Ellena, testified about how she felt about her brother. (Tr. pp. 1198-1199). She testified that they had always been close, that he had always been a loving, caring person not to her but to a lot of people. (Tr. p. 1199). She said he had "always been honest with" her and was her "rock." (Tr. p. 1199). Further, that many days he helped her, "but he has always been there." (Tr. p. 1199). In conclusion, she asked the jury to let him live. (Tr. p. 1199).

The Solicitor then began his closing argument on the law and the mitigating circumstances that the defense presented and told the jury to "look at the individual characteristics of this defendant and the crime." (J.A. p. 39). (Tr. p. 1205). The Solicitor described the heinous brutality that occurred on the evening of Mr. Haynes' murder. Particularly, he stated:

And you will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strew them across the bike path, thinking nothing of that. Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared

little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

(J.A. p. 41). The prosecutor then read the card called "The Game Guy's Prayer" to the jury that was in evidence. (J.A. p. 42). He further commented that another item the defendant went through of the victim's was a voter registration card. (J.A. p. 43). He stated that Haynes believed in his community and that "you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers." (J.A. 43). The Solicitor concluded that "the proper verdict, the only verdict, in this case is death." (J.A. p. 44). No objection or request for any curative instruction was made during the argument.

Defense counsel Sandlin then argued for the jury to continue to "demonstrate

your high regard for human life." He urged the jury to remember that "Ricky Haynes is a victim and a victim I don't want you to forget ... [and] the clear implication is that he was a Christian." (J.A. p. 45). Further, he argued for the jury "to think about what the implications of that Christian faith were and are and will be in the future." (J.A. p. 45). He urged compassion and mercy and suggested that the question was "where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant?" (J.A. p. 46). (Emphasis added). He concluded that they were only "answerable to God" and "blessed are the merciful." (J.A. p. 46).

The trial court entered in its penalty phase instructions to the jury to guide its decision-making. (J.A. pp.

46-56). During the instructions, the trial court emphasized that "the defendant's criminal culpability must be limited to his participation in the death and criminal sexual conduct against the defendant, Richard Haynes." (J.A. p. 54). At the conclusion of the instructions, the trial court stated:

[Y]ou must decide the issue involved in this proceeding without bias and with prejudice to any party. You cannot allow yourselves to be governed by mere sympathy, by prejudice, by passion, or by public opinion. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all the evidence in the case, and that you will follow the law as I have explained it to you

(J.A. p. 56). After the charge was given to the jury, the defense counsel stated that he would note, for the first time, "our objection to the State's argument to the jury concerning the prayer that was read. We believe that it's an appeal to passion and improper

argument." (J.A. p. 57). Counsel moved for a mistrial, or in the alternative, to remove the exhibit from the jury's consideration. The motion was denied. After approximately two hours' deliberations, the jury returned their verdict finding the statutory aggravating circumstance of murder was committed while in the commission of criminal sexual conduct in the first degree and recommended that Gathers be sentenced to death by electrocution. (Tr. p. 1246). After the jury was polled, the trial court sentenced Gathers to death for murder and thirty (30) years consecutive for criminal sexual conduct. (Tr. p. 1260).

SUMMARY OF THE ARGUMENT

The Eighth Amendment does not preclude consideration by a sentencing jury of evidence related to the circumstances of the offense, even though such characteristics may reveal personal characteristics of the victim. Similarly, there can be no constitutional violation by a prosecutor's comment on this properly admitted evidence that gives the jury a glimpse of the life a capital defendant chose to extinguish. Such evidence and comment is relevant in a sentencing proceeding because it relates to the harm caused by the defendant to the victim and the individual circumstances of the crime. Where virtually no limits are placed upon evidence about the personal characteristics of the defendant, such evidence about the victim, obvious from the crime itself,

is useful to assess the defendant's moral culpability and blameworthiness, especially when a defendant was in a position to know of these characteristics prior to his final assault on the victim. To the extent that Booth v. Maryland, supra, precludes such comment, it should be re-examined and overruled or modified as an incorrect statement of the requirements of the Eighth Amendment.

Further, the decision of the South Carolina Supreme Court misconstrued Booth v. Maryland, supra, which allowed comment under evidence that revealed victim characteristic from evidence of the crime. The type of information found violative in Booth is readily distinguishable from the comment in the instant case. The test should not be whether the prosecution comment was unnecessary for an understanding of the

circumstances of the crime where the evidence of the characteristics were obvious to a juror, but rather whether they relate to the circumstances of the crime. Under this situation, the comments should require a new sentencing hearing only when they deprive the defendant of a fundamentally fair sentencing proceeding. In the instant case, considering the evidence, the arguments, and the instructions as a whole, the defendant's Eighth Amendment rights were not violated. The prosecution in a capital case is not required to treat the victim as a mere abstraction to the sentencing process. The South Carolina Supreme Court's decision to the contrary must be reversed.

ARGUMENT

- I. The Eighth Amendment does not preclude prosecutorial comment on a victim's personal characteristics related to a capital crime.

The Eighth Amendment does not preclude comments in a penalty phase of a capital murder trial by the prosecutor that are directly related to the circumstances of the crime. In Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), this Court generally stated that a particular victim impact statement introduced at the sentencing phase of a capital murder trial violated the Eighth Amendment. This Court noted, however, personal characteristics of the victim "may well be admissible because they relate directly to the circumstances of the crime." Booth, supra, 107 S.Ct. 2535, n. 10.

In the instant case, the victim, Richard Haynes, a self-proclaimed

minister was at a park bench in the evening hours in Charleston, South Carolina. (J.A. pp. 26-27). While changing his clothes and displaying his religious tracts, including a Bible and angel statues, he was met by Demetrius Gathers and his roving gang. (J.A. pp. 16-18, 26-27). After a brief conversation, Gathers struck the victim in the face just with his fist, then with a bottle, then with an umbrella, and later with a knife. (J.A. pp. 18-19, 22, 23, 30). Gathers went through the victim's belongings, including the religious materials and started throwing the materials around while looking for something to steal before he struck the victim with the umbrella. (J.A. pp. 27-28). Two Bibles, the angel, and religious cards were found laying next to the victim's body. (Tr. pp. 787-788). Included among the materials

at the scene was a voter registration card and a card with "the Game Guy's Prayer." [Tr. p. 782 (State Exhibit 19), p. 787 (State Exhibit 15)]. These items were received in evidence in the guilt phase without objection by the defense counsel. Also, while being beaten by Gathers, the defenseless victim was described as going "wild." (J.A. p. 19). Testimony from his mother also revealed the victim had a recent history of mental problems but was non-violent. (J.A. p. 4).

This evidence of the crime revealed certain evidence, obvious to Gathers during the commission of the offense, which the prosecutor discussed in his penalty phase argument. We submit that the Eighth Amendment does not require a state to redact and neutralize the victim from the trial when the properly admitted evidence reveals personal

characteristics of the victim such as religious practices at the time of the crime, his mental or physical deficiencies which may have caused him to be unable to protect himself from the malicious perpetrators, and various items, which the perpetrators rejected as not worthy of theft, that were maliciously strewn around his body during the event. Is this information relevant to the circumstances of the crime or reveal certain personal characteristics of the defendant, Demetrius Gathers? We submit that it is and therefore could be subjected to permissible argument by the prosecutor.

In a capital murder case, the sentencer "does not attempt to decide whether particular elements have been proved, but instead makes a unique, individualized judgment regarding the punishment that a particular person

deserves." Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring). In California v. Ramos, 463 U.S. 992, 1008 (1983), the Court explained:

In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In facing a penalty, however, there is no similar 'central issue' from which the jury's attention may be divested. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury ..., the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized.

As this Court has consistently held, the factors considered by the capital sentencer must include "the character and record of the individual offender and the circumstances of the particular offense." Woodson v. North Carolina,

428 U.S. 280, 304 (1976). (Emphasis added).

The circumstances of the offense should include who the victim was and what he was doing when the crime occurred. These factors are related to the Eighth Amendment concept of proportionality that requires "that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness." Enmund v. Florida, 458 U.S. 782, 823 (1982) (O'Connor, J. dissenting).

In this proceeding, unlike Booth, the comments did not focus on the reputation of the victim and the effect on his family, but the circumstances of the crime over which the defendant had control, the apparent choice of a vulnerable victim. The defendant may choose, or decline, to premeditate, to act callously, to attack a vulnerable

victim, to commit a crime while on probation, or to amass a record of offenses. Booth v. Maryland, supra, 107 S.Ct. at 2534, n. 7 (1987). Certainly evidence of the characteristics of a victim that reflects his vulnerability that came from evidence of the offense are appropriate in an Eighth Amendment analysis.

Here, the victim's slight build, his open vulnerability by preaching to any person, his mental problems, and his location in the park with his religious items in the evening additionally reflect the character of the defendant who made his choice to attack this victim while learning these matters during the vicious attack. This is not the type of evidence of personal qualities of a victim, such as standing in the community, that the Eighth Amendment was concerned with. This

evidence and comment were not sought to be rebutted, but rather were relied upon by the defense as a shield from the death penalty in their closing argument when they asked the jury what the victim and his Christianity would ask them to do concerning taking another's life. (J.A. p. 45).

The Respondent has argued before this Court that because the victim, who they came upon at night, was a stranger to Gathers prior to the incident weighs against the Petitioner's argument. The Respondent fails to recognize certain salient facts that permitted this comment. During the crime, it could reasonably be inferred from the evidence that the defendant obviously learned of his apparent religious practice by the items on the park bench, his talk with the victim, and by his viewing of the items looking for something to steal

during the assault, but before he had beaten the victim with the umbrella or stabbed him with the knife. (J.A. pp. 18, 24, 26-28). This was not the situation that concerned the author of Booth about when a defendant often will not know the victim or the characteristics of the family of the victim. Booth, supra, 107 S.Ct. at 2534. To redact this information from the penalty phase or the argument would make the victim, Richard Haynes, a mere abstraction to the crime itself. The Eighth Amendment, we submit, requires otherwise.

The prosecution's comments, based upon evidence relating to the circumstances of the crime which had been introduced before the same jury, unlike the Booth situation, contained no reference to the residual effect the murder had upon the victim's family or

upon the community, nor did it convey to the jury the opinions of the victim's family concerning the crime, the defendant, or the appropriate punishment. "At most, this thumbnail sketch ... gave the jury a quick glimpse of the life [respondent] chose to extinguish." Mills v. Maryland, 486 U.S. __, __, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384, 408 (1988) (Rehnquist, C.J., dissenting). Accord Daniels v. State, 528 N.E.2d 775 (Ind. 1988) (prosecution's remarks referring to personal information about the victim adduced from guilt phase evidence is proper). Moon v. State, No. 45722, __S.E.2d__ (Ga., November 30, 1988) (no Booth violation where facts about victim properly developed during the trial was the subject of the prosecution argument). Brooks v. Kemp, 762 F.2d 1383, 1409 (11th Cir. 1985); Kordenbrock

v. Scroggy, 680 F.Supp. 867 (E.D. Ky. 1988) (Booth not intended to reach a closing argument where the jury is reminded that crimes have victims who are persons who have families); State v. Rice, 757 P.2d 889, 906 (Wash. 1988) (jury should be allowed to consider the crime's impact on the victims and argument on that topic is proper to the extent that it is restricted to the circumstances of the crime).

In this regard, the California Supreme Court's analysis is particularly appropriate:

[A]t the penalty phase the jury decides a question the resolution of which turns not only on the facts but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of the defendant's background against those that may offend the conscience. In this process, one of the most significant considerations is the nature of the underlying crime.

Hence, assessment of the offense from the victim's viewpoint would appear germane to the task of sentencing.

People v. Haskett, 640 P.2d 776, 790 (Cal. 1982). See also People v. Hovey, 749 P.2d 776, 795 (Cal. 1988) (prosecutor's remarks did not violate Booth where confined to matters obvious to any juror). The Eighth Amendment should not require a different approach by prosecutors, especially in response, as here, to the defense's effort in mitigation to present the defendant and his family as suffering persons.

The decision of the South Carolina Supreme Court may prohibit the use of such relevant information from being used where it underscores the gravity of this offense. Justice White correctly stated that "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled

to put in, see, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982), by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Booth, supra, 107 S.Ct. 2540 (White, J., dissenting).

Similarly, Justice Scalia stressed this same distinction in his dissent in

Booth:

To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to proscribe a debate of the appropriateness of the capital penalty with one side muted. If that penalty is constitutional, as we have repeatedly said it is, it seems to me not remotely unconstitutional to permit both the pros and cons in the particular case to be heard.

Booth, supra, 107 S.Ct. at 2542 (Scalia, J., dissenting). In his dissent in Mills v. Maryland, supra, Chief Justice Rehnquist, while stating that he did not interpret Booth as foreclosing the introduction of all evidence, in whatever form, about a murder victim, reasserted that "if a jury is to assess meaningfully the defendant's moral culpability and blameworthiness, one essential consideration should be the extent of the harm caused by the defendant." Mills v. Maryland, supra, 486 U.S. at ___, 108 S.Ct. at 1876, 100 L.Ed.2d at 408. To the extent that Booth is determined not to allow this consideration or argument, we submit that it was wrongly decided. Here, the evidence from the guilt phase and the prosecutor's comment related to factors about which the defendant was aware and, hence, were arguably relevant to his

decision to kill. Compare Booth, supra, 107 S.Ct. at 2534, with People v. Spreitzer, 525 N.E.2d 30, 44-45 (Ill. 1988). See also Preston v. State, 531 So.2d 154, 160 (Fla. 1988); State v. Cummings, 323 N.C. 181, 372 S.E.2d 541 (1988); State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); State v. Colvin, 314 Md. 1, 548 A.2d 506 (1988) (victim briefly described and photograph in life presented); Gilmore v. Armontrout, No. 88-1378, __F.2d__ (8th Cir. Nov. 10, 1988); Bryne v. Butler, 845 F.2d 501, 510-512 (5th Cir. 1988); Hayes v. Lockhart, 852 F.2d 339 (8th Cir. 1988); Evans v. Thigpen, 683 F.Supp. 1079 (S.C. Miss. 1987); Blanco v. Duggar, 691 F.Supp. 308, 322 (S.D. Fla. 1988).

In this case, as reflected by the mitigation evidence, as in all death penalty cases, virtually no limits are placed on the mitigating evidence a

defendant may introduce concerning his own history and circumstances, yet the State, under Booth may be precluded from demonstrating similar characteristics, relevant to the crime, and how or why the victim placed himself in a vulnerable position. If a jury is to access the defendant's moral culpability and blameworthiness, one consideration must be information about the murder victim. If this information also reflects the extent of the harm caused by the crime on the family or society as a whole, it should not be error. Similarly, if a victim was the President, a mayor, or a police officer whose loss clearly affected society, the fact of the jury's knowledge of this status should not be seen as an Eighth Amendment violation when it is brought to a jury's attention by evidence from the circumstances of the crime.

Clearly, when a defendant, as here, is reasonably aware of the personal characteristics at the time of the crime, the time of his selection of the victim, there is no constitutional violation. The prosecution is not required under the Eighth Amendment to stand mute when these facts are in the record to assess the defendant's blameworthiness and moral culpability. It speaks of the defendant and of the appropriate punishment the law demands.

II. The decision of the South Carolina Supreme Court misconstrued Booth v. Maryland, supra.

The South Carolina Supreme Court held that Booth v. Maryland, supra, was violated because the Solicitor generally commented on evidence presented earlier that the victim was a small, religious person with mental problems who

possessed a voter registration card. These comments were derived from expressly non-objected guilt phase evidence from his mother about his leaving the house with his religious materials as a self-proclaimed minister who "talks to people all the time about the Lord" and the immediate circumstances of the crime when he was brutally killed while in a park with his religious items laid out on a park bench and his possessions subsequently scattered around him while the perpetrators looked for something to steal before he was murdered. (J.A. pp. 4-5, 26-28). The Solicitor's direct reference in closing argument to this admitted evidence which necessarily revealed information about the victim's and defendant's characteristics did not violate Booth v. Maryland, supra. The South Carolina Supreme Court's apparent

extension of Booth to such an argument was in error.

In Booth v. Maryland, supra, the plurality of the Supreme Court stated that their general disapproval of statutory victim impact statements does not mean this type of information will never be relevant. "Similar types of information may well be admissible because they relate directly to the circumstances of the crime." Booth, supra, 107 S.Ct. 2529, n. 10. More recently in Mills v. Maryland, supra, the dissent found no Booth violation in introduction of evidence that revealed "a thumbnail sketch of the victim's difficult childhood and frequent encounters with correctional authorities."

Clearly, the information present here was not the same type of information presented on the Victim

Impact Statement in Booth. There, the Victim Impact Statement included information from family members on the character and reputation of the victims and their status in the community. The Victim Impact Statement further related the problems the victim's family members were having with the deaths. This is a far cry from the situation here where the information now complained of directly bears upon the crime and its motive.

Here, the fact that the victim was religious was directly connected to a circumstance of the crime -- his apparent study (or preaching) of his religious beliefs when he was accosted. Further, his mental problems directly related to his vulnerability at the hands of the gang of perpetrators that came upon him that night. The voter registration card was another item

rejected by the defendant after they had scattered his belongings looking for something to steal, after striking him unconscious, while the victim sought peace of mind in the city park.

In Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974), this Court stated that "a court should not lightly infer that a prosecutor intended an ambiguous remark to have its most damaging meaning." Here, the South Carolina Supreme Court's analysis of Booth could be seen to inappropriately require the prosecutor to sanitize and redact any characteristics of the victim from the case for fear that the evidence could be seen to be arbitrary. If it is correct that whether it is error to comment that a victim was small and religious when he was attacked by four perpetrators after he was apparently practicing his religion, it is a logical next step that

comments that a burglary victim lived alone and was elderly and weak would be similarly infirm. The Constitution does not require that conclusion.

Unlike the "sterling member of the community" comparison decried in Booth that had little nexus with the crime, here the characteristics evolved out of the crime itself. Simply put, it was the state's theory of the case that the motive and reason that Ricky Haynes was assaulted and murdered was because he was a vulnerable and likely victim suffering from some mental disability who was willing to talk to people all the time about the Lord from the park bench until the heinous brutality inflicted by Demetrius Gathers occurred.

The Eleventh Circuit in Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), vacated on other grounds in Kemp v. Brooks, __U.S.__, 106 S.Ct. 3325, 92

L.Ed.2d 732 (1986), stated:

While argument focusing on the victim can be dangerous, not all prosecutorial references to the victim are improper. The fact that there is a victim, and the facts about the victim properly developed during the course of the trial, are not so far outside the realm of 'circumstances of the crime' that mere mention will always be problematic. It is not necessary that the sentencing decision be made in a context in which the victim is a mere abstraction.

762 F.2d 1409. The South Carolina Supreme Court's restrictive reading of Booth requires a new sentencing when there are extensive comments as the victim's character that "were unnecessary to an understanding of the circumstances of the crime." The test in Booth is not whether the prosecutor's comments were "unnecessary" for an understanding of the crime in light of other evidence, but rather whether "they relate directly to the circumstances of the crime." Booth, supra, 107 S.Ct.

2529, n. 10. The state court's interpretation of Booth is in error and demands vacation.

In Booth, the Court was apparently careful to stress that personal characteristics of a victim may well be admissible where such information related to the circumstance of the crime and was supported by the evidence. While Booth did not discuss the precise issue of prosecutorial comment on the evidence, we submit that the appropriate test for such comment would be under the teachings of this Court in Donnelly v. DeChristoforo, supra, and Darden v. Wainwright, 477 U.S. 168 (1986), as to whether the comments so infected the trial with unfairness as to make the resulting conviction [sentence] a denial of due process." Booth clearly involved much more than argument about the personal characteristics of the victim.

Even a cursory comparison of the Victim Impact Statement permitted before the jury in Booth and the comments of the prosecutor in the instant case reveal a wealth of difference in the scope, tone, and effect of the information provided. The focus of Booth was on the information that described the effect of the murder and bereavement on the family and friends of the victim and contained their opinion and characterizations of the crime itself. The Victim Impact Statement was very detailed and focused in graphic detail on how the family members' lives had been altered by this incident.

The same cannot be said of the prosecutor's comments. The prosecutor did focus on the victim as a religious person and the possessor of a voter registration card. While this comment in other cases under Booth may be

considered to be error, here it clearly was not because it related to the criminal event itself. The uncontradicted fact that the victim was at the park bench with his religious materials set out spoke volumes about the character of a defendant who would brutalize that solitude. The uncontradicted fact that the defendant scattered the personal possessions of the victim, including his religious cards and voter registration card, looking for something of value to him to steal after he had assaulted the victim before the final blows, speaks to the blameworthiness of the same defendant. These facts were inextricably tied to the circumstances of the case and should be the subject of permissible comment under the Eighth Amendment. This is especially true in a case where the defense counsel attempted to use the

victim's religion as a shield before the jury from the death penalty. (J.A. p. 45). ("I ask you to think about what the implications of that Christian faith were and are and will be in the future.")

Additionally, the Donnelly analysis requires that the solicitor's closing argument be viewed as a whole along with the jury instructions. Here, the solicitor generally stated that the decision for life or death should not be based on sympathy for the victim but "you look at the mitigating and aggravating circumstances. You look at the individual characteristics of this defendant and the crime." (J.A. p. 39). During the penalty phase instructions to the jury, the trial court stated "the defendant's criminal culpability must be limited to his participation in the death and criminal sexual conduct

against the defendant, Richard Haynes." (J.A. p. 54). Finally, the trial court admonished the jury that "you cannot allow yourselves to be governed by mere sympathy, by prejudice, by passion, or by public opinion." (J.A. p. 56). Far from requiring the jury to focus on extraneous issues, the trial court directed the jury's attention to the defendant and his crime and instructed them to ignore the unguided passion and prejudice. While under Booth, supra, some prosecutorial references to a victim's family or character may be improper, the comments in this case clearly did not render his trial fundamentally unfair.

Because the death penalty is qualitatively different from all other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the

appropriate punishment." Woodson v. North Carolina, supra, 428 U.S. at 305. The procedures must comport with the Eighth Amendment's prohibition against cruel and unusual punishment, which, in the capital sentencing context, requires that sentencing discretion "be suitably directed and limited so as to minimize the risk of wholly arbitrary or capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). But capital sentencing is still an emotional issue and necessarily will always be so. Barclay v. Florida, 463 U.S. 939 (1983). ("It is entirely fitting for the moral, factual and legal judgment of judges and juries to play a meaningful role in sentencing.") Empathy for a defendant's individual characteristics or revulsion at the moral affront of his crime, reactions accepted as bases for capital sentencing decisions, are not

susceptible to full explanation without recourse to human emotion. Nor can reason alone fully explain the reaction of a juror upon hearing the facts of a particular crime described in their tragic detail. The fact that an argument by the prosecutor or the defense counsel has emotional overtones does not independently indict it as improper. The propriety of the argument rests primarily in the relation of its content to issues relevant to the sentencing jury's concern.

Here, the South Carolina Supreme Court found alleged Eighth Amendment error by the prosecutor's comments in the penalty phase about the victim's religious practices and his possession of a voter registration card. Taken to its logical extension, the decision would require the prosecutor to remove this evidence from the case itself

presented in the guilt phase. The simple fact that Richard Haynes, a self-proclaimed minister, with his Bible, rosary beads, statues, and religious tracts was at a park bench on the evening of his death was evident to the defendant and to the jury both in the guilt phase and the penalty phase. The simple fact that Gathers scattered these items, including a voter registration card, looking for items valuable to him prior to the murder, was evident to the defendant and the jury at each phase of the trial.

To accept the lower court's logic would require that a jury be instructed not to consider any personal characteristics of the victim that may contrast with the personal characteristics of the defendant. The Eighth Amendment does not require such redaction and Booth v. Maryland, supra,

should not be so interpreted as requiring it. In Zant v. Stephens, 462 U.S. 862, 885 (1983), this Court made clear that the jury, in its punishment decision, may properly consider any information about the individual defendant and his offense. Accord Barclay v. Florida, supra. The fact of a victim's circumstances at the time of the offense--being in a store, a church, a political gathering, or at a park--or a victim's unique status known to a defendant before the final blow is struck--the President, a judge, a policeman, or a street minister--or his physical condition--elderly, weak, disabled, or healthy--are circumstances that are obvious from the circumstances of a crime. Because such characteristics are obvious to a juror from the evidence in the case, prosecutorial comment may not be

"necessary" to prove the circumstances of the crime. The Eighth Amendment, however, does not preclude such comment based upon the obvious evidence related to the crime. It is not necessary that the sentencing decision be made in the context that the victim is a mere abstraction. The decision of the South Carolina Supreme Court to the contrary must be reversed.

CONCLUSION

For the foregoing reasons, the State of South Carolina requests this Court to reverse the decision of the Supreme Court of South Carolina and remand the matter for further proceedings not inconsistent with the decision.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General of
South Carolina

* DONALD J. ZELENKA
Chief Deputy Attorney
General of
South Carolina

CHARLES M. CONDON
Solicitor, Ninth
Judicial Circuit

ATTORNEYS FOR PETITIONER

* Counsel of Record

December 9, 1988
Post Office Box 11549
Columbia, South Carolina 29211
803-734-3737

No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

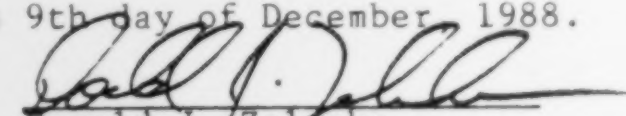
DEMETRIUS GATHERS,

Respondent.

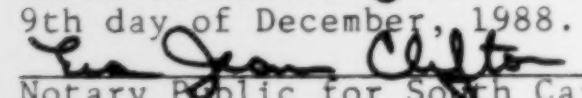
AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief for Petitioner on the Respondent by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to William Isaac Diggs, Esquire, 1122 Lady Street, Suite 301, Columbia, South Carolina 29201. He further certifies that all parties required to be served have been served.

This 9th day of December, 1988.


Donald J. Zelenka

SWORN to before me this
9th day of December, 1988.

 (LS)
Notary Public for South Carolina
My Commission Expires: 4-18-95.

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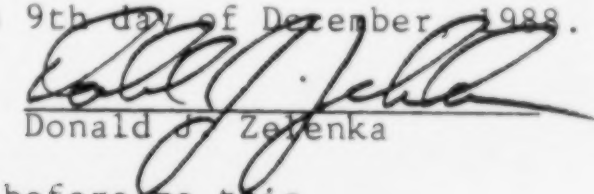
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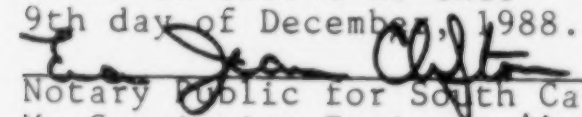
AFFIDAVIT OF FILING

PERSONALLY appeared before me,
Donald J. Zelenka, who being duly sworn,
deposes and says that he is a member of
the Bar of this Court and that on this
date he filed the original and forty
copies of Brief for Petitioner in the
above captioned case by depositing same
in the U. S. Mail, first-class postage
prepaid, and properly addressed to the
Clerk of this Court.

This 9th day of December, 1988.


Donald J. Zelenka

SWORN to before me this
9th day of December, 1988.

 (LS)
Notary Public for South Carolina
My Commission Expires: 4-18-95.